Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Emergency Declaratory	)	CC Docket 94-102
Ruling by California State 9-1-1	)	
Program Manager	)	

CONSOLIDATED OPPOSITION OF NATIONAL EMERGENCY NUMBER ASSOCIATION

The National Emergency Number Association ("NENA") hereby opposes the Application for Review of United States Cellular Corporation ("USCC") and the Petition for Reconsideration of Omnipoint Communications, Inc. ("Omnipoint"), both filed January 19, 1999, challenging the Declaratory Ruling of the Wireless Telecommunications Bureau ("Bureau Ruling"), DA 98-2572, released December 18, 1998.[1] We urge the full Commission to dispose promptly of both challenges, even though Omnipoint's is directed to the Bureau.[2]

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[1] The combined effect of Sections 1.115, 1.106 and 1.4 of the Commission's rules is to establish a common date of February 3, 1999 for oppositions to the Application for Review and Petition for Reconsideration.

[2] Section 1.104(b) permits the Bureau to refer petitions for reconsideration of its actions to the full Commission, obviating the need for the sequential disposition referenced in subsection (c).

NENA supports the Consolidated Opposition filed separately today by the California State 9-1-1 Program Manager, (1) identifying the weaknesses in the USCC and Omnipoint challenges and (2) explaining the advantages of filing informational tariffs, compared with the difficulties of calculating any incremental insurance risks in wireless E9-1-1 services. Apart from California, however, Omnipoint doubts whether "wireless operators in other states may be entitled to similar state PUC protections." (Petition, 7)

The state decisions Omnipoint cites are not on point.

The Pennsylvania and New York authorities cited by Omnipoint (Petition, 7, n.10 and 8, n.12) hardly support its claim that these states have abandoned wireless carrier regulation. In Pennsylvania, the referenced 1995 order retained control over quality of intrastate service, certain consumer interests in billing and collection, and the filing of informational reports. It tentatively distinguished between PCS and cellular services with respect to their "utility" status.[3] Similarly, in New York, the exclusion of wireless E911 costs from recovery under the state's Targeted Accessibility Fund ("TAF") was nothing more than a recognition that wireless carriers had not

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[3] Implementation of the Omnibus Budget Reconciliation Act of 1993, 1995 Pa. PUC LEXIS 57, 13-20.

been required to pay into TAF. The 1998 state decision acknowledged that wireless carriers were not utilities under the Public Service Law, but its narrow holding simply excused these carriers from contributing to TAF. The order did not speak to other possible regulation.[4]

Despite the foregoing, NENA appreciates Omnipoint's request for broader guidance (Petition, 6), and suggests that the Commission ought to provide it.

The CTIA and BellSouth petitions are overdue for decision.

Nearly a year ago, CTIA and BellSouth filed separate petitions for further reconsideration of the Commission's 1996 and 1997 orders on wireless E9-1-1.[5] Among their proposals was the filing of informational tariffs at the FCC that would give notice of carrier intent to limit liability for service failures or negligent acts. NENA and other public safety communicators supported the suggestion, so long as the tariffs were consistent with applicable state law.[6]

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[4] Order . . . Instituting a Targeted Accessibility Fund, 1998 N.Y. PUC LEXIS 325, 55-61.

[5] Report and Order, 11 FCC Rcd 18686 (1996); Memorandum Opinion and Order, 12 FCC Rcd 22665 (1997).

[6] Opposition and Comments of NENA, APCO and NASNA, March 18, 1998, 8-9.

We are puzzled by the FCC's delay in reacting to the CTIA and BellSouth proposals. It is a relatively small step from the implied endorsement of state informational tariffs (Bureau Ruling, ¶18) to the approval of filing federal tariffs consistent with state law. Alternatively, the Commission should consider an affirmative declaration that state informational tariffs not involving regulation of rates or entry clearly fall under the "other terms and conditions" exception in Section 332(c)(3)(A) and are not subject to federal preemption. Surely this would be the case where the filing of such tariffs is voluntary on the part of wireless carriers.

State liability-limitation tariffs are not entry or rate regulation.

In an earlier order involving California, the FCC discussed hypothetically the possibility that complaint procedures and means for identifying and monitoring the business activities of wireless carriers would constitute non-preempted other terms and conditions.[7] State informational tariffs would appear to fit within that category of identifying and monitoring carriers. In recalling the 1995 discussion, however, the Bureau Order, perhaps inadvertently, prolongs the uncertainty when it states:

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[7] Report and Order, PR Docket 94-105, 10 FCC Rcd 7486, 7549-50 (1995).

> The Commission has declined to define a particular demarcation point between preempted rate regulation and retained authority over other terms and conditions.

In 1996, the FCC expressed similar hesitation in specifying how state or locally-imposed funding mechanisms, especially surcharges on wireless customers, could run afoul of the preemption in Section 332(c)(3)(A). 11 FCC Rcd at 18722. What might have been commendable caution three years ago is now beginning to look like abstention for its own sake. Surcharges have become the funding mechanism of choice. The Commission is aware of them. Absent further action, the clear implication is that surcharges do not amount to rate regulation.

Similarly, state tariffs for wireless service exist – at least in California if not elsewhere. The Bureau Order appears to accept this with equanimity, but stops short of approval:

> *To the extent that* a carrier can employ this [state tariff] or other options to legally limit its liability, it may be unnecessary to obtain insurance, or incremental insurance costs for E911 may be minimal. (emphasis added)

Why not just say it? The Commission should declare, without qualification, that state tariffs allowing carriers to limit their liability constitute "other terms and conditions" not preempted by federal law.

CONCLUSION

For the reasons discussed, the FCC should consider together, and deny, the Application for Review of USCC and the Petition for Reconsideration of Omnipoint. Long overdue, however, is a decision on (1) the year-old CTIA/BellSouth proposals for federal informational tariffs limiting wireless carrier liability and/or (2) an affirmative declaration that state informational tariffs are not precluded by Section 332(c)(3)(A) of the Communications Act when they do not regulate wireless service entry or rates.

Respectfully submitted,

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February 3, 1999 ITS ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that I have on this 3rd day of February 1999 served copies of the foregoing *Consolidated Opposition of National Emergency Number Association* by first-class mail, postage prepaid, on all parties of record in the above captioned proceeding.

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